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No. 90-1699

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM 1990

STEPHEN CHI-SEN LI,
Petitioner,

VS.

GILBERT R. RUIZ, Judge, Municipal Court of East Los Angeles; COUNTY OF LOS ANGELES; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA
Respondents.

STEPHEN CHI-SEN LI,
Petitioner,

VS.

COUNTY OF LOS ANGELES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I. Does the imposition of strict criminal liability under the Los Angeles County Health Code as applied to petitioner, deprive petitioner due process of law?

II. Does the Ninth Circuit's formulation of implied notice meet the test of "actual knowledge" or the "possibility of such knowledge" under *Lambert v. California?*

III. By allowing a Health Department Sanitarian to arbitrarily deny petitioner the opportunity to present his case at a mandatory administrative hearing prior to referring the matter to the district attorney's office for criminal prosecution, did the County of Los Angeles deny petitioner his right to due process and equal protection of the law?

IV. Did the prosecution's denial of the existence of the regulations governing the Health Department's inspection and review procedures applicable to petitioner's apartment building, thereby limiting petitioner's defenses at trial, deny petitioner his right to a fundamentally fair trial?

V. Did defense counsel's failure to object to the application of strict liability, to argue Petitioner's right to notice, due process and equal protection of the law, and to submit his own jury instructions to support the theory of the defense, deny petitioner the effective assistance of counsel?

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Petitioner, STEVEN CHI-SEN LI, respectfully prays that a Writ of Certiorari issue to review the memorandum decision of the United States Court of Appeals for the Ninth Circuit which affirmed the District Court's judgments dismissing petitioner's petitions for a Writ of Habeas Corpus arising from petitioner's conviction in the Municipal Court of two violations of the Los Angeles County Health Code.

OPINIONS BELOW

The memorandum decision of the Court of Appeals on petitioner's consolidated appeals is unpublished and appears in Appendix A to this Petition. The unpublished written Judgment of the District Court dismissing petitioner's Petition for Writ of Habeas Corpus and its Order adopting the findings, conclusions and recommendation of the United States Magistrate in *Steven Chi-Sen Li v. Gilbert R. Ruiz, etc. et. al.* appear in Appendix B to this Petition. The unpublished written judgment of the District Court dismissing petitioner's Petition for Writ of Habeas Corpus and its Order adopting the findings, conclusions and recommendation of the United States Magistrate in *Stephen Chi-Sen Li. v. County of Los Angeles* appear in Appendix C to this Petition. The unpublished final reports and recommendations of the Magistrate, adopted by the District Court, appear in Appendix D and E.

JURISDICTION

The Court of Appeals decision in this matter was filed on January 9, 1991. A timely Petition for Rehearing was filed on January 23, 1991. The Court of Appeals' denial of the Petition for Rehearing was issued on March 5, 1991 and is set forth in Appendix F. This Court's jurisdiction is evoked under Title 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the United States Constitution is set forth in Appendix G. Amendment VI to the United States Constitution is set forth in Appendix H. Amendment XIV Section 1 to the United States Constitution is set forth in

Appendix I. Relevant regulations of the Los Angeles County Health Code Ordinance are set forth in Appendix J. The Environmental Management and Operations Manual of the Los Angeles County Department of Health Services, Nos. 105.01, 105.09, 105.21 and 105.22 are set forth in Appendix K.

STATEMENT OF THE CASE

Petitioner is the defendant in the case of *People of the State of California vs. Stephen Chi-Sen Li.*, No. M264456. Petitioner was convicted of two misdemeanor offenses that occurred on or about June 25, 1985 — failing to maintain all lavatories, bathtubs, and showers and the fixtures and equipment therein in a state of good repair and from dirt, filth, and corrosion in violation of Los Angeles County Ordinance 11.20.190; and failing to vent gas range by approved means in violation of Los Angeles County Ordinance 11.20.240.

The Judgment of conviction[1] was affirmed by the Appellate Department of the Superior Court on January 26, 1988. Petitioner's Petitions for Rehearing and Certifica-

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[1]Petitioner is unlawfully restrained of his liberty and is in constructive custody by an order granting probation, entered on July 29, 1986, by Respondent, Gilbert R. Ruiz, Judge of the Municipal Court of the East Los Angeles Judicial District, County of Los Angeles. The order required in part that he bring the subject real estate/rental property located in Montebello, California up to health code by September 26, 1986. Following a Report of Investigation by the Los Angeles County Department of Health Services dated October 1, 1986, the prosecution filed its Petition for Revocation of Petitioner's Probation. On November 17, 1986, Judge Ruiz revoked probation which was then reinstated on the same terms and conditions except that petitioner was to serve two weekends in jail and obey all laws including the health code laws. He was released on his own recognizance and execution of the sentence stayed pending appeal.

tion to the California Court of Appeal were denied on February 24, 1988. Petitioner's Petition to the Superior Court for Writ of Habeas Corpus was denied without an evidentiary hearing on March 4, 1988. On March 30, 1988, petitioner filed a Petition for Writ of Habeas Corpus in the Court of Appeal for the Second Appellate District and on March 31, 1988, the court denied the Petition by unpublished order. Petitioner filed a Petition for Review of his Petition for Writ of Habeas Corpus in the California Supreme Court in Case No. S005185, which was summarily denied on June 22, 1988.

Petitioner then filed his initial Petition for Writ of Habeas Corpus in the United States District Court for the Central District of California. Because petitioner had not exhausted his state remedies on the issue of ineffective assistance of counsel that claim was severed and the remaining issues considered by the district court.

On December 4, 1989, United States District Court Judge Stephen V. Wilson ordered the adoption of the Magistrate's Final Report and Recommendation. On December 5, 1989, Judgment was entered dismissing petitioner's Petition for Writ of Habeas Corpus on the merits. On December 26, 1989, petitioner filed his notice of appeal. On March 22, 1990, Judge Wilson denied petitioner's Petition for issuance of a Certificate of Probable Cause. On May 1, 1990, the Ninth Circuit granted petitioner's request for Certificate of Probable Cause.

To exhaust his state remedies on the ineffective assistance of counsel issue, petitioner filed a petition for writ of habeas corpus in the California Supreme Court in Case No. 009681. The petition was summarily denied by the California Supreme Court on May 17, 1989.

On December 28, 1989, petitioner filed a second petition writ of habeas corpus with the District Court on the remaining issue of inadequate assistance of trial counsel.

United States District Court Judge William J. Rea ordered the adoption of the Magistrate's Final Report and Recommendation, and on April 17, 1990, Judgment was entered dismissing petitioner's second Petition for Writ of Habeas Corpus on the merits. On May 11, 1990, petitioner filed his notice of appeal. On May 22, 1990, Judge Rea denied petitioner's Petition for Certificate of Probable Cause. On June 27, 1990, the Ninth Circuit granted petitioner's Request for Certificate of Probable Cause. On October 18, 1990, the Ninth Circuit consolidated petitioner's appeal in *Stephen Chi-Sen Li v. Gilbert R. Ruiz, etc. et. al.* 90-55432 with *Stephen Chi-Sen Li v. County of Los Angeles* 90-55695 and decided that the case was suitable for decision without oral argument. The Ninth Circuit affirmed the judgments of the District Court and denied petitioner's Petition for Rehearing.

STATEMENT OF THE FACTS

Following a telephone call from an unidentified individual in the City of Montebello's Code Enforcement Unit, Health Inspector Ismael Gonzalez of the Los Angeles Health Department proceeded to petitioner's apartment building in Montebello, California, and inspected the premises on April 25 and 26, 1985. The Health Department had not received any tenant complaints concerning the building. RT 10-11, 76-77. After the inspection, a copy of his report was mailed to petitioner, listing the violations; specifying which apartment each violation related to; what was needed to bring that violation into compliance with the health code; and set a reinspection date of May 29, 1985. RT 9-13, 19, 24-25. The violations observed

on April 25 and 26, 1985, formed the basis for Inspector Gonzalez's decision to bring criminal charges for noncompliance based on his later inspection on June 25, 1985. RT 23.

Rather than returning to the location on the date set for compliance on May 29, 1985 (where petitioner had waited all day in order to show that the violations had been corrected), Inspector Gonzalez returned to the premises on June 17, 1985, with the Montebello Code Enforcement Unit to conduct a follow-up investigation. RT 25, 27-28. He decided that petitioner was still in noncompliance. On June 25, 1985, Gonzalez returned with his supervisor, Cervanto Lozano, to take photographs for the filing of criminal charges. RT 22, 28-30. Gonzalez then decided not to hold an administrative or District Attorney hearing because he falsely claimed he had inspected other properties that petitioner owned that had "similar violations, similar multi-family dwellings" and that the year before he had gone through "the same hearings in order to get compliance." RT 13-14, 16, 162-63; Exhibits E and F to District Court. Lozano concurred in Gonzalez' decision not to seek a hearing. RT 181-82. The criminal complaint was then filed.

REASONS FOR GRANTING THE WRIT

The issue at bar pits the landlord's right to due process of law against the right of the state to impose strict criminal liability for violation of "public welfare offenses" in the rental housing market, a market which comprises approximately 36% of United States households.[2] Certiorari should be granted to resolve, under the due process

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[2] *Statistical Abstract of the United States* 1990, Occupied Housing Units, Table 1274.

clause, the requisite knowledge and notice that a landlord must have, if any, prior to his being held criminal culpable for defective health conditions on a tenant's premises over which the landlord has no actual or practical control on a day-to-day basis.

Significantly, a landlord does not have possession or ongoing access to a tenant's premises to avoid possible criminal sanctions by the exercise of reasonable care. A multi-family apartment dwelling is not a hotel or motel where the owner normally provides maid and house cleaning services on a daily basis. To extend strict liability to conditions over which landlord has no practical control on a day-to-day, week-to-week or month-to-month basis, is patently unreasonable. The landlord cannot control the acts of a tenant when they take place behind the tenant's closed door, since they are done in the privacy of the tenant's home.

To require the landlord to inspect on a daily or weekly basis would necessarily conflict with the tenant's right to privacy and the quiet enjoyment of his premises. With respect to the tenants, a landlord is in a far different position than if he were in an employee-employer relationship or was a manufacturer or retailer who expressly or impliedly represents the quality of his product to the public and over which he has ongoing supervision. The landlord cannot assert quality control over a tenant's acts or habits, nor can he conduct spot checks without being accused of harassment.

Traditional Anglo-American common law has long required the doing of a prohibited act or causing a proscribed result when accompanied by criminal intent (*mens rea*) to establish criminal culpability. The recognition of criminal responsibility under such a concept focuses on moral blameworthiness and punishment of those

who made evil choices.[3] Criminal law, in some form has always required a degree of evil intent.[4] Biblical expressions reflect that distinctions between *mala in se* and *mala prohibita* were lifted from theological teachings.[5] Judeo-Christian concepts such as sin, guilt, forgiveness and punishment appear repeatedly throughout the history of criminal law.[6]

St. Augustine, for one, observed, "the tongue is not guilty unless the mind is guilty;"[7] an idea virtually repeated verbatim in the laws of Henry I.[8] During the dark ages, *mens rea* was seldom at issue in the feudal law. Most harms were treated as some sort of tort, requiring monetary damages to a victim's family.[9] By the middle of the 13th century, however, writings indicate that the concept of *mens rea* was recognized and, by the beginning of the 17th century, the idea of criminal intent was established

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[3]J. Wyrsch & J. Cook, *Amendment VI: Criminal Intent and Due Process*, "The Champion", NACDL, p. 10 (April 1991).

[4]Note, *The Development of Crimes Requiring No Criminal Intent*, 26 Marq. L. Rev. 92 (1982).

[5]"For from the inside, from a person's heart, come the evil ideas which lead him to do immoral things, to rob, kill, commit adultery, be greedy, and do all sorts of evil things . . ." Mark 7:21-22. *See* Mark 7:15-23 and 3 Epistles of Seneca 92, line 57.

[6]J. Hall, *Law, Social Science and Criminal Theory*, pps. 12-13 (1982); F. Pollack & F. Matland, *The History of English Law*, p. 476 (2nd Ed. 1923).

[7]"Ream linguae non facti risa mens rea" quoted in J. Wyrsch & J. Cook, *supra* at 11.

[8]J. Hall, *supra* at 12-13; F. Pollack, *supra* at 476.

[9]J. Inverarity, P. Lauderdale, B. Feld, *Law and Society, Sociological Perspectives of Criminal Law*, pgs. 96-97 (1983).

as a necessary element for a criminal conviction.[10] Moral blame had thus become a predicate for criminal liability.[11]

The foundation for criminal liability at English common law required the concurrence of both intent and act to constitute a crime. "So well entrenched was the concept of concurrence of criminal intent, *mens rea*, with criminal behavior, *actus reus*, that statutes which [made] no reference to intent were deemed to require malice, an intention to harm, by implication."[12] The only exception was the recognition at common law that some young children lacked the capacity to make evil decisions, and thereby lacked blameworthiness. The doctrine of English common law was accepted by the courts of the United States by the early 19th Century and with it came the incorporation of criminal intent.[13]

The move away from criminal intent towards the adoption of strict liability took place as a response to the Industrial Revolution. The first steps occurred in England, where, in 1860, Parliament created the first act in dealing with the sales of food and drugs. While one clause of the act incorporated a *mens rea* requirement, a second clause of the act imposed strict liability for selling unadulterated foods. This act proved to be the first of many which created "public welfare offenses" in the areas of food, liquor, gambling and poaching, and represented a sociopolitical movement towards increased government

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[10]R. Singer, *The Resurgence of Mens Rea: III — The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. Rev. 337, 338 (1989).

[11]J. Wyrsch & J. Cook, *supra*, p. 11.

[12]C.P. Erlinder, *Mens Rea, Due Process, and the Supreme Court: Toward a Constitutional Doctrine of Substantive Criminal Law*, 9 Am. J. Crim. Law 163, 166 (1981).

[13]*Id.*

intervention.[14] Yet, by the end of the 19th century, no consistent trend emerged for the imposition of strict liability. While English courts were hesitant to interpret statutes to impose strict liability, the erosion of criminal intent had, nevertheless, begun.[15]

In the United States, the dissolution of the doctrine of *mens rea* occurred predominately in the post-Civil War years. With increased commercialization and urbanization, a trend developed toward strict liability offenses in regulatory and public welfare areas — areas which legislatures and courts justified by distinguishing acts which were *mala in se* from *mala prohibita*.[16] The weakening of the criminal intent requirement in the United States centered in the areas of liquor control and protection of minors, but many courts continued to require some form of criminal intent or, at the very least, allowed mistake as a defense.[17]

I

In dismissing petitioner's argument that his conviction violated due process because it was based on strict criminal liability, the Court of Appeals for the Ninth Circuit cited *United States v. Freed*, 401 U.S. 601, 607-10 (1971) where this Court upheld a statute requiring registration of hand grenades, even though that statute required no showing of "scienter," and *Morissette v. United States*, 342 U.S. 246, 255 (1952) where this Court recognized that strict liability is often imposed for "public welfare

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[14]J. Wyrsch & J. Cook, *supra* at 11; R. Singer, *supra* at 345-47.

[15]R. Singer, *supra*, at 345-48, 362-63; C. P. Erlinder, *supra*, at 168.

[16]C.P. Erlinder, *supra*, at 168-169.

[17]R. Singer, *supra*, at 363.

offenses" — those offenses that are "in the nature of neglect were the law requires care, or inaction where it imposes a duty."

In *Freed*, the Court held that the proscribed act of possessing hand grenades, highly dangerous offensive weapons, is such that it should alert the doer to the consequences of his deeds. The Court observed that the statute was similar to that in *United States v. Dotterwiech*, 320 U.S. 277 (1943), in which strict liability was upheld in respect to a corporate officer whose firm shipped adulterated and misbranded drugs[18] and *United States v. Balint*, 258 U.S. 250 (1922), where defendant was convicted of a sale of narcotics against his claim that he did not know the drugs were covered by a federal act.[19] Neither of these cases are remotely similar to petitioner's passive conduct in allegedly violating the County Health Code.

The Court in *Freed* went on to describe the Court's holding in *Morissette v. United States, supra*, as being at

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[18]In *Dotterwiech*, the primary issue of the case required a determination of vicarious liability and a secondary issue focused on strict liability. Justice Frankfurter writing for the Court, did not deal directly with the constitutionality of the strict liability offenses or a requirement of criminal intent; rather, the Court assumed for purpose of the opinion that the lower court correctly held that intention to violate the statute was not a requirement of the Food, Drug and Cosmetic Act.

[19]In *Balint*, the defendant was indicted for selling and possessing drugs. The trial court sustained the defendant's demurrer to the indictment and the government appealed to the Supreme Court, asserting their reliance on the concept of strict liability. Since the defendant made no appearance before the court, the issue was dispensed with on the basis of an *ex parte* presentation. Chief Justice Taft's opinion seemed to support strict liability in *dictum*. *Balint*, however, decided the narrow issue of whether an indictment to the crime must charge intent. *See* R. Singer, *supra* at 398-399.

one extreme and *Lambert v. California*, 355 U.S. 225 (1957) at the other. Petitioner submits that his conduct in this petition falls closer to *Lambert* than *Freed* or *Morissette*. In *Freed*, the National Firearms Act made it unlawful for any person to receive or possess a firearm which was not registered to him. Hence, a defendant must "receive or possess" the firearms which connotes some activity on the part of the accused. Here, petitioner did not have possession of the tenant's apartment to give him actual or probable knowledge of latent health conditions on the premises. He was in a wholly passive position and unaware of the alleged defects.

In *Morissette*, the Court held that criminal intent is an essential element of the crime of knowing conversion of government property. The opinion required a requisite mental intent to be read into statutory offenses with a tradition at common law. In reaching this result, the Court commented on the growing number of "public welfare offenses" which did not require "scienter," to denote guilty knowledge, or "mens rea," to signify an evil purpose or mental culpability. 342 U.S. at 252. The Court noted the characteristics of such offenses:

> "The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might be reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation." *Id* at 256.

In this case, petitioner was sentenced to the maximum fine of $1,000 and one year in jail, which was suspended, and he was placed on summary probation for three years. Such a sentence cannot be considered a "relatively small"

penalty. The misdemeanor conviction could cause petitioner to be ineligible to become a naturalized United States citizen. In addition, his professional licenses as certified public accountant and as a real estate broker could be jeopardized. Accordingly, petitioner's livelihood could be threatened and the conviction result in grave harm to him.

The Ninth Circuit, nevertheless, reasoned "he (petitioner) was the owner of the property and was therefore in a position to keep the premises in reasonable repair. Failing to maintain bathrooms in good repair and failing to have adequate ventilation do not require daily or weekly inspections, as (petitioner) asserts; they simply require occasional inspections that are not overly burdensome to tenants." (Appendix A, p.4.). Petitioner submits that "occasional inspections" as suggested by the Ninth Circuit would not necessarily accomplish the job as shown by the facts in his case.

Here, petitioner had waited all day on May 29, 1985, the date set for reinspection, to demonstrate that all violations cited in the April 26, 1985 Inspection Report had been corrected, including apartment 14. The inspector, however, failed to appear. At trial, the inspector identified a photograph taken on June 25, 1985 of a corroded, deteriorating bathtub, broken shower door and water damaged wall in the bathroom of apartment 14. The only relevant condition listed on the April 26, 1985 report, however, was a corroded bathtub which petitioner was specifically instructed to "repair or replace . . . as to vermin-proof dwelling" which had been repaired by patching the holes along the bathtub seam where vermin could harbor. The other conditions were not listed in the April 26, 1985 report. The time period between May 29, 1985 and June 25, 1985 is less than a month. Assuming

the term "occasional inspection" refers to monthly inspections, such an inspection would not have placed petitioner in a position to avoid these transgressions.

Further, the nature of the conditions at issue here, such as a broken shower door and water damaged wall, are attributable to the tenants in possession and are of a type that they can occur at any time. They cannot be detected by "occasional inspections" on a month to month or quarterly basis, thereby insuring that the landlord will not be prosecuted for conditions of which he was not aware. For example, the frequency in which an exhaust fan becomes inoperable due to grease build-up occasioned by the cooking habits of the tenants, does not lend itself to the occasional inspection and a landlord is necessarily dependent on being informed by the tenant of the condition between inspections. Here, the record does not reflect any notice given by the tenants to petitioner of the defective conditions at issue.

In *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), this Court interpreted the intent requirement of the Sherman Anti-Trust Act. Although no intent requirement was specified by statute, the Court held that some form of intent was required in anti-trust offenses. The Court found that pursuant to the principles of Anglo-American criminal jurisprudence, the existence of *mens rea* was the rule rather than the exception. The Court further stated that a presumption existed that *mens rea* was a requirement for crimes having their origins in common law and such a presumption extended even to crimes unknown to common law. While *Gypsum*, addressed the absence of criminal intent in a statute without legislative intent, the Court held that strict liability statutes, while not *per se* unconstitutional, were generally viewed with disfavor. The Court also cited the Model

Penal Code with approval. Later, in *Colautti v. Franklin*, 439 U.S. 379 (1979), the Court found that a statute which did not contain a criminal intent element was unconstitutionally vague and held that a determination of vagueness is closely related to the presence or, alternatively, the absence of a criminal intent requirement. *Id* at 395.

In *United States v. Bailey*, 444 U.S. 394 (1980), the Court reiterated the general rule that criminal liability requires an "evil mind." The Court used the Model Penal Code as its basis for determining the appropriate *mens rea* for a violation of 18 U.S.C. Section 751(a) (escape from federal custody). Significantly, sections 2.01(1)-.02(1) of the Model Penal Code provide that criminal liability may not be imposed unless a person acted "purposely, knowingly, recklessly or negligently . . . with respect to each material element of the offense." The Code is vigorously anti-strict liability, providing there are no strict liability "crimes" within the Code, only strict liability "violations".[20]

More recently, in *Liparota v. United States*, 471 U.S. 424 (1985), the Court acknowledged that the mental element in criminal law encompassed more than the two possibilities of "specific" and "general" intent. *Id.* at 423, n. 5. Thus, in contrast to the holding in *Balint*, the Court now appears to require some form of moral blameworthiness, a minimum level of culpability,[21] to define a criminal offense. *Liparota* declared that requiring *mens rea* was in keeping with the longstanding recognition of the principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Id.* at 427. The reluctance to criminalize innocent conduct was also ex-

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[20]R. Singer, *supra* at 381.

[21]See *United States v. Park*, 421 U.S. 658, 672-73 (1975).

pressed by the dissent in *United States v. Yermian*, 486 U.S. 63 (1984) (Rehnquist, J., dissenting), a case decided a year before *Liparota*. The dissent argued that the Court's interpretation made a "surprisingly broad range of unremarkable conduct a violation of federal law." *Id* at 82 (Rehnquist, J., dissenting) (quoting *Williams v. United States*, 458 U.S. 279, 286 (1982)).

The Court in *Bailey*, by referring to the degrees of criminal intent delineated by the Model Penal Code, suggests a framework which prevents legislatures from obviating the *mens rea* requirement in order to regulate society based on fleeting political and social agendas.[22] *Bailey* and *Liporata* make clear that the Model Penal Code is the starting point for an inquiry into the sufficiency of the substantive elements of a criminal offense.[23] Here, petitioner was convicted in the absence of a *mens rea* requirement. It should be noted that law revision commissioners in both Canada and England have also endorsed the abolition of strict liability crimes.[24]

II

While conceding that the April report did not mention the specific violations for which he was convicted (Appendix A, p.5), the Ninth Circuit reasoned that petitioner was not deprived of the required notice or opportunity to comply because the report should have "moved" petitioner to inspect the rest of his property for instances of disrepair since he knew the property would be subject to Health Code inspection. (*Id.*) Clearly, the Health Code

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[22]J. Wyrsch and J. Cook, *supra* at page 13.

[23]*Id.*; C.P. Erlinder *supra* at 189.

[24]R. Singer, *supra* at 375.

inspection reports could easily become a trap for the unwary.[25] Even if petitioner fully complied with the inspection report, under the Ninth Circuit's analysis, he would still be subject to criminal liability for conditions not mentioned in the inspection report.

In addition, the type of conditions were such that even though the conditions were corrected prior to the reinspection date, they could easily reoccur after the date set for reinspection. The Ninth Circuit's reasoning further raises a problem where the landlord follows the inspector's recommendation for repair to the letter only to find that he is later prosecuted for the same condition despite the specified repairs. In petitioner's case, he was to replace or repair the "bathtub so as to vermin-proof the dwelling." Petitioner patched the holes along the seam of the bathtub to vermin-proof it only later to be prosecuted for the corrosion itself as a health hazard.

This Court in *Lambert v. California, supra,* 355 U.S. at 229, stated that "actual knowledge of the duty [to register as a felon] . . . or proof of the probability of such knowledge and the subsequent failure to comply are necessary before a conviction . . . can stand." The Court did not say that notice is presumed or implied. In petitioner's case, there was no actual or probable notice of the broken shower door and water damaged wall. Being cited for one condition does not give actual or probable notice of the development of a subsequent condition occurring after the date set for reinspection. The facts reflect that petitioner was never given actual or probable notice of the broken shower door and water damaged wall prior to the

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[25]Note, *Ignorance of the Law as an Excuse*, 86 Colum. L. Rev. 1392, 1398 (1986) ("such laws place unbridled discretion in the hands of police and prosecutors").

criminal complaint being filed. Thus, such notice that may "move" someone to conduct further inspection and repair adds an additional element or duty beyond that established in *Lambert* whose conduct in that case was also wholly passive. Besides petitioner having no actual knowledge, there was also no proof of petitioner's subsequent failure to comply which is necessary if petitioner's conviction is to stand.

III

In denying petitioner's assertion that the failure to provide an administrative hearing as required by the Health Department violated his right to due process, the Ninth Circuit relied on *United States v. Caceres*, 440 U.S. 741, 752 (1979) to conclude that "[a]n administrative agency's violation of its own regulations does not in itself constitute a due process violation" and further, "[t]he County did not create any additional liberty interest by establishing a provision for administrative hearings. At most, it created an expectation of process Yet, '[P]rocess is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individuals has a legitimate claim of entitlement' " (quoting *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983)). (Appendix A, p. 5.)

First, the Ninth Circuit failed to note that in *United States v. Caceres, supra,* the regulations were drafted to conform to the requirements of the Attorney's General's October 16, 1972 Memorandum to the Heads of Executive Departments and Agencies. The Health Department Manual, which mandates administrative hearings, are statutory in nature, having been duly promulgated pursuant to the Los Angeles County Health Code Section 11.02.160.

Manual No. 105.05 explicitly states that the administrative hearing notice is the first step in due process of law.[26]

Second, because the Manual is used in each office and program to guide the personnel and supervisors in the more than 80 cities and in the unincorporated areas of the Los Angeles County, petitioner had a legitmate claim of entitlement besides his due process right, i.e., equal protection of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

Third, the fact that sanitarian Gonzalez overstepped his authority in denying petitioner administrative hearings when he decided alone to file criminal charges and so signed the Complaint without the mandatory review and approval of Chief Sanitarian as required by the Manual, makes petitioner's case more that just a case where "[T]he agency does not follow its own regulations," it became a case of selective prosecution. It involved the inspector Gonzalez being the judge (determined violations), the prosecutor (decided non-compliance of such violations), and the jury (decided alone to file criminal charges), all rolled into one.

IV

The facts in petitioner's case simply do not support the Ninth Circuit's contention that the prosecution did not suppress the Health Department Manual in violation of *Brady v. Maryland,* 373 U.S. 83, 87 (1963). "It was available at the Health Department, . . . and LI's counsel apparently had no difficulty obtaining the Manual on appeal." (Appendix A, p. 6). In fact, prior to trial, it was agreed that the Health Department would provide trial

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[26]"The Hearing Notice can be issued in all cases as the first step in due process of law."

counsel through informal discovery with all applicable manuals and procedures relevant to petitioner's case. Out of frustration, trial counsel noted on the record, that after getting no response from the Health Department, he personally went to the East Los Angeles Health Department and met the Chief Sanitarian, Mr. Begnera, and he was specifically informed that there was no manuals on apartment buildings with respect to inspection procedure. Counsel was not provided with any Health Department procedures. (R.T. 98). If it is true, as the Ninth Circuit observes, that the Manual was "available at the Health Department," then certainly the Chief Sanitarian knew that. Here, the Chief Sanitarian purposely withheld the Manual.

Moreover, at trial, prosecution witnesses, sanitarians Gonzales and Lozano, admitted that manuals existed, but denied they contained written procedures governing administrative and District Attorney's hearings. The prosecution continued to withhold from petitioner the Health Department's written guidelines so he could not impeach their testimony or use them in petitioner's defense in direct contravention of *Brady v. Maryland* and *Giglio v. United States,* (1972) 405 U.S. 150, 154. During closing argument, the prosecutor also argued to the jury that there was no written policy. (R.T. 506). The Manual was suppressed insofar as trial counsel was misled as to its existence. Consequently, *Lugo v. Munoz,* 682 F.2d 7, 10 (1st Cir. 1982) relied on by the Ninth Circuit to conclude that "the prosecution's omission was not 'of sufficient significance to result in denial of the defendant's right to a fair trial.' " (quoting *United States v. Agurs,* 427 U.S. 97, 108 (1976), (See Appendix A, p. 7-8) is distinguishable on its facts.

Without the Manual, petitioner was stripped of a meritorious defense and the ability to impeach the prosecution's witnesses false testimony. Once impeached, trial counsel could then have argued to the jury to distrust their testimony in its entirety. (See CALJIC 16.000/9, 1979). The testimony of Gonzales and Lozano was the only evidence offered against petitioner with respect to Counts 3 and 5. Where petitioner had offered independent evidence to rebut Gonzalez and Lozano's conclusions, he was acquitted as to those counts.

V

Petitioner's trial counsel filed a "boiler plate" discovery motion and failed to specifically request copies of the relevant regulations of the County Health Department or the Environmental Policy and Operations Manual of the Los Angeles County Department of Health Services. Trial Counsel's failure to request said discovery prejudiced petitioner in this case. The Manual provided the guidelines for the written notice and administrative hearing denied petitioner. After learning of the Manual's existence at trial, despite the witness denying that it contained proceedings governing administrative hearings, counsel erred in failing to renew his discovery request or to immediately subpoena the Manual.

The general procedure set forth in Manual guideline No. 105.01 provides: "Written orders and administrative hearings shall be the initial approach to obtaining compliance with applicable laws and regulations." It should be noted that the plural form of "Written order and administrative hearing" is used to describe the initial approach to obtain compliance with laws, and Section 11.02.140 of Los Angeles County Health Code provides that the word "shall" is mandatory. Therefore, irrespective of whether

the defective conditions observed on April 26, 1985 used the initial approach of written order and resulted in an administrative hearing to obtain compliance, this does not preclude this approach from being used again to obtain the compliance with the defective conditions such as broken shower door and water-damaged wall in the bathroom of Apartment No. 14 which was observed on June 25, 1985.

Policy and Operations Manual No. 105.22 provides that Notice to Appear citations may be used without exhausting all regular law enforcement procedures if severe public health consequences are present and after obtaining supervisory review and District Attorney approval.[27] Petitioner submits that with respect to the defective conditions in said bathroom, he was denied both the written order specifically describing the violations with a reasonable time to abate the conditions and the administrative hearing to show cause why he had not complied.

With respect to the non-operating stove vent fan, he was denied an administrative hearing in which he could have had an opportunity to state his case and demonstrate why criminal proceedings should not be initiated. Petitioner would have been able to show that he had complied and corrected the cited violations. More importantly, petitioner was also denied the mandatory review by the Chief Sanitarian prior to the filing of the criminal Complaint. (Manual No. 105.21). No review by the Chief Sanitarian was conducted in petitioner's case.

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[27]This process was not utilized in petitioner's case. No evidence was introduced that the alleged defective conditions in petitioner's building posed a severe public health consequence.

The Ninth Circuit's conclusion that the witness's credibility would not have been significantly damaged by their impeachment with respect to the policy governing administrative hearings is incorrectly premised upon its belief that "the basic facts about the conditions in the building (a corroded bathtub and a non-operating exhaust fan) appear to have been uncontroverted." (Appendix A, p.8-9.) Petitioner, however, testified that he had complied with the April 26, 1985 inspection report. (RT 319-20, 324.)

Petitioner also testified that he visited the building to take care of the service requests of various tenants two or three times each week during the month of June 1985 (RT 372-73.) Petitioner specifically testified that he maintained all the bathroom fixtures in a state of good repair and free from corrosion, during the month of June, 1985 (RT 337-38). Petitioner denied that the black spot along the edge of the tub depicted in the photograph taken on June 25, 1985 was the result of corrosion. Petitioner testified that it was mildew — a housekeeping problem. (RT 354-55, 358.) Lozano agreed that infrequent cleaning and an accumulation of moisture might be the cause of the mildew that caused the corrosion (RT 206). Lozano did not recall if there were any plumbing problems that caused a mildew buildup on the bathtub depicted on the photograph. (RT 206-07.) With respect to the non-operating exhaust fans in the vents for the gas ranges, all that was required was degreasing and not the replacement of motors (RT 282-83, 338). Grease accumulation which slows the fan and keeps it from functioning properly can occur frequently based on the cooking techniques used by the tenants.

Although a stove ventilation system can be vented by either of two approved means, the jury instructions in this

case did not inform the jury what "approved means" meant or referred to the instructions. Trial counsel inexcusably accepted the prosecution's instructions and failed to submit his own jury instructions to fully present petitioner's defense to the jury. Petitioner's counsel was aware of the definition of "by approved means" and mentioned it in his closing arguments to the jury, but failed to incorporate this defense into an appropriate jury instruction. It is reasonably likely that the outcome of the trial would have been different if a proper jury instruction had been given in light of the inspector's testimony.

The Ninth Circuit speculates that the jury must have known what the approved means[28] were to vent a stove which met the requirements of an open air system and that the jury concluded that the ventilation was not adequate, "possibly because they believed the non-operating fan would block the air passage so that it was not equivalent to an open air system." (Appendix A, p.9.) While Lozano was aware that petitioner's venting system had the "non-operating" fan; yet, when asked if there was anything blocking the area for the fumes to go up into the vent, he testified, "No." (RT 204-05, 241-42.) There was no testimony in the record that the exhaust fan would possibly block the air through the vent. Accordingly, the

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[28]Section 11.20.240 of the Los Angeles County Health Code provides:

> "Gas ranges — venting. A gas range shall be vented by one of the following means:
>
> 1. A ventilator opening in a wall or ceiling having an area of not less than 6 by 8 inches in connection with a ventilating duct of not less than 36 inches in a cross sectional area leading to the outside air;
>
> 2. An approved system of forced — draft ventilation."

Ninth Circuit decision contravenes Lozano's expert testimony. Section 11.20.240 of the Los Angeles County Health Code refers only to the ventilation opening and the cross-sectional area of the venting duct, leading to the outside air, which petitioner's system met, based on expert opinions referenced as exhibits and submitted to the District Court.

In addition, competent trial counsel should have at least argued that petitioner's defense was not limited to impossibility, factual discrepancy or non-ownership as stated by the trial court, but included good faith compliance with the notice received by petitioner from the Health Department. Consequently, petitioner could have argued that he had complied and corrected all of the violations listed in the April 26, 1981 Inspection Report on or before May 29, 1985, when he waited, all day at the apartment building and the sanitarian failed to appear.

Counsel's failure to argue that notice was a necessary prerequisite for conviction or to introduce the April 26, 1985 Report into evidence, clearly prejudiced petitioner. Sanitarian Gonzalez testified that there were 92 violations in the April 26, 1985 Inspection Report, which petitioner had not corrected and which formed the basis of the subsequent prosecution for noncompliance. It should be noted that out of the 92 violations of various apartments within the 38 unit complex, two of the photographs at issue here that were taken to show the typical, if not the worse conditions, were taken from Apartment No. 14. Apart from the alleged corroded bathtub, the photographs do not reflect the defective conditions cited in April 26, 1985 inspection report. Further, while Gonzalez and Lozano claimed two to six bathtubs were in the same corroded condition as Apartment No. 14, the April 26, 1985 Report did not reflect any other bathtubs in the

building which were in corroded condition. With respect to the non-operating fans in the vents for the gas ranges, sanitarian Gonzalez was under the mistaken notion that the fan identified in the photograph of apartment No. 14 did not have a flu duct connected to the outside of the building. He erroneously believed that because it was a two-story apartment building, there was nothing to vent to the outside. (RT 151, 154.) In fact, all of the gas range exhaust vents, vented to the outside through the roof of the building. (RT 341-43.)

The trial court stated that since it was a strict liability crime, petitioner was limited to establishing impossibility, factual discrepancy and non-ownership of the premises on June 25, 1985. Consequently, the trial court's ruling made it irrelevant for petitioner to present evidence or tenant testimony to support his testimony that he corrected all 92 listed violations and kept the building in good repair on the reinspection date, May 29, 1985.

Therefore, insofar as petitioner prevails on his contentions that he was entitled to notice, that strict liability was inapplicable, and that he was deprived of due process, equal protection and a fair trial, his trial counsel was ineffective in not presenting said defenses and objections at trial.

CONCLUSION

As criminal law is increasingly used to regulate ordinary and unremarkable conduct, the danger that criminal sanctions will be applied in an arbitrary manner to unblameworthy people who have had no notice of possible criminal liability and thus no chance to conform their conduct, increases dramaticly. Criminal sanctions applied in this way without blameworthiness have little support under the traditional system of Anglo-American jurisprudence. In a society which maintains and encourages individualism and autonomy, its laws must give fair notice as to responsibility of conduct and severity of punishment. Such a system allows members of the society to be responsible for themselves and rejects conformity in maintaining social order and control.[29]

Under our system of laws, punishment serves as a form of retribution and deterrence. Penalties resulting from criminal culpability act as imposing social stigma on those who knowingly, purposely, or recklessly act in disregard of social or moral duties.[30] Strict criminal liability is contrary to the basic premise of criminal liability — that only a morally blameworthy defendant should be stigmatized, much less imprisoned. Hence, the imposition of severe penalties for the commission of a morally innocent act violates not only the foundation of criminal liability in our society, but also the due process and equal protection provisions of the United States Constitution.

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[29] J. Wyrsch & J. Cook *supra* at 13.

[30] *Id.*

For the reasons set forth herein, a writ of certiorari should issue to review the decision of the Court of Appeals in this matter.

DATED: May 3, 1991

Respectfully submitted,

ROBERT J. WATERS
Attorney for Petitioner
STEPHEN CHI-SEN LI

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHEN CHI-SEN LI,
Petitioner - Appellant,
VS.
GILBERT R. RUIZ, Judge,
Municipal Court of East Los Angeles;
COUNTY OF LOS ANGELES;
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Respondents - Appellees.

STEPHEN CHI-SEN LI,
Petitioner - Appellant,
VS.
COUNTY OF LOS ANGELES,
Respondent - Appellee.
No. 90-55432
D.C. No. CV-88-7100-SVW
MEMORANDUM*
No. 90-55695
D.C. No. CV-89-7414-WJR

Appeals from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding
William J. Rea, District Judge, Presiding

Submitted November 30, 1990**
Pasadena, California

Before: NORRIS, HALL, and RYMER, Circuit Judges

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Stephen Chi-Sen Li was convicted in Municipal Court of two violations of the Los Angeles County Health Code. After an inspection of Li's building in April 1985 the County Health Department sent him a report that identified numerous violations and gave him thirty days to comply. In June 1985, the Health Department again inspected and found that none of the violations had been corrected. The Department proceeded directly to a criminal prosecution, without an administrative hearing.

At Li's jury trial, the health inspector and his supervisor testified that Li's building had a corroded bathtub and a non-operating stove exhaust fan. They also testified that no written policy regarding administrative hearings existed. The jury was instructed that it did not need to find guilty knowledge or intent to find Li guilty; and it returned a verdict finding him guilty of failing to maintain bathrooms in good repair and failing properly to vent a gas range. He was sentenced to probation.

Li unsuccessfully appealed his conviction. He then filed a petition for writ of habeas corpus in state court which was denied, and his subsequent state court appeals were also denied. He next filed a habeas corpus petition in federal court; because he had failed to exhaust state remedies on the issue of ineffective assistance of counsel, that claim was severed and only the remaining issues were considered. After exhausting state remedies on the ineffective assistance issue, Li filed a second federal habeas corpus petition. The district court denied both petitions and the two cases have been consolidated on appeal. The denial of a petition for habeas corpus is reviewed de novo.
Norris v. Risley, 878 F.2d 1178, 1180 (9th Cir. 1989). We affirm both decisions.

I

Li challenges the trial court's jury instruction that violation of the Health Code is a strict liability crime. To the extent that Li is challenging the trial court's interpretation of the Health Code, he is raising an issue of state law, which may not be considered in a petition for habeas corpus. 28 U.S.C. § 2254(a). Li's only federal claim is that his conviction violated due process because it was based on strict liability.

The mere fact that criminal law has no requirement of intent does not make it unconstitutional. In *United States v. Freed*, 401 U.S. 601, 607-10 (1971), the Court upheld a statute requiring registration of hand grenades even though the statute required no showing of scienter, noting: "This is a regulatory measure in the interest of the public safety, which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act." *Id.* at 609. *See also Morissette v. United States*, 342 U.S. 246, 255 (1952) (recognizing that strict liability is often imposed for "public welfare offenses," those offenses that are "in the nature of neglect where the law requires care, or inaction where it imposes a duty").

The violations at issue here are public welfare offenses. Li failed to maintain his rental property as specified by the Health Code and for that the County chose to impose criminal penalties. He argues that strict liability is improper in his case because he was not in a position to prevent the harm and the penalty was not relatively small. Yet he was the owner of the property and was therefore in a position to keep the premises in reasonable repair. Failing to maintain bathrooms in good repair and failing to have adequate ventilation do not require daily or weekly inspections, as Li asserts; they simply require

occasional inspections that are not overly burdensome to tenants. Also, the penalty here was relatively small. The violations were charged as misdemeanors, and Li was not required to serve jail time.[1] Under the circumstances, Li "would hardly be surprised to learn" that he needed to inspect his property before the Health Department came to inspect. *See Freed*, 401 U.S.at 609.

II

Li also argues that his conviction is unconstitutional because he was not given adequate notice and an opportunity to comply. "There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition.... On the other hand,.... [e]ngrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges." *Lambert v. California*, 355 U.S. 225, 228 (1957) (striking down a law requiring felons to register with the city within five days).

Li was given adequate notice. That the April report did not mention the specific violations for which he was convicted did not deprive him of the required notice or opportunity to comply. The report should have moved Li to inspect the rest of his property for instances of disrepair since he knew the property would be subject to health inspection and he knew that maintaining the bathrooms was a requirement of the Health Code. Thus, Li was put on sufficient notice to comply with or defend against charges of Health Code violations.

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[1]Li was sentenced to two weekends in jail for violating probation, but because that sentence was not for the Health Code violations it does not change our analysis.

III

Li argues that the failure to provide an administrative hearing as required by the Health Department Manual violated his due process rights. An administrative agency's violation of its own regulations does not in itself constitute a due process violation. *United States v. Caceres*, 440 U.S. 741, 752 (1979).

Nor has Li shown that he has been deprived of any liberty without due process of law. He was, of course, deprived of liberty when he was ultimately placed on probation, but that only occurred after he was afforded a full criminal trial. The Constitution provides no liberty interest in not having criminal proceedings brought without an administrative hearing. The County did not create any additional liberty interest by establishing a provision for administrative hearings. At most, it created an expectation of *process*. Yet, "[p]rocess is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983). The only substantive interest here was not to face criminal penalties, but that interest was fully protected by the criminal trial. Accordingly, Li was not deprived of liberty without due process of law.

IV

Li contends that his constitutional rights were violated because the prosecutor failed to disclose the Health Department Manual after a discovery request in violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The prosecutor's duty to disclose information includes "production of impeachment evidence." *Bagley v. Lumpkin*, 798 F.2d 1297, 1300 (9th Cir. 1986) (citing *United States v. Bagley*, 473 U.S. 667, 677 (1985)).

Because Li wanted to use the Manual to impeach the witnesses' testimony that no written policy regarding administrative hearings existed, the Manual could have become 'evidence' for purposes of the Brady rule. However, the prosecution did not suppress the Manual. It was "available at the Health Department," Appellant's Opening Brief at 27, and Li's counsel apparently had no difficulty obtaining the Manual on appeal. Therefore, the prosecution did not suppress evidence in violation of *Brady*. *See Lugo v. Munoz*, 682 F.2d 7, 10 (1st Cir. 1982) ("Since the information at issue here [psychiatric evaluation that was a matter of public record] was available to the defense attorney through diligent discovery, we find that the prosecutor's omission was not 'of sufficient significance to result in the denial of the defendant's right to a fair trial.' ") (quoting *United States v. Agurs*, 427 U.S. 97, 108 (1976)).

V

Li finally argues that he was denied effective assistance of counsel in violation of his sixth amendment rights. To prevail on an ineffective assistance of counsel claim, the defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 689-94 (1984).

Li asserts that counsel should have discovered Los Angeles County Health Code sections that define substandard buildings as "nuisances" and require notification in writing and an opportunity to comply. However, Li received adequate notice of the substandard condition of his property. Therefore, any error by counsel in failing to

discover the regulations could not have affected the outcome of the trial. For the same reason, Li's claim that counsel should have introduced the April 26 Inspection Report into evidence to show lack of adequate notice fails.

Li also argues that counsel was ineffective in failing to object to the strict liability jury instruction. As we have held, instructing on strict liability was proper under the Constitution. It was also proper under California law because strict liability is appropriate for the sort of regulatory offenses involved in this case. *See, e.g., People v. Gonda,* 138 Cal. App.3d 774, 779, 188 Cal.Rptr. 295, 297 (1982) ("[T]he courts have consistently held that even where the statute requires a 'wilful' violation, public welfare offenses in general are punishable without proof of criminal intent."). Li could not have been prejudiced by counsel's failure to object.

The argument that counsel should have discovered the Health Department Manual providing for administrative hearings also fails. First, Li asserts that he was prejudiced because counsel could have moved to dismiss on due process and equal protection grounds if he had known about the Manual. However, as Li had no constitutional right to the administrative hearing, dismissal would not be warranted on that ground.

Second, Li argues that he was prejudiced by the failure to get the Manual because counsel could have used it for impeachment. The Manual could have been used to show that the prosecution's witnesses were wrong when they said no policy regarding administrative hearings existed. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland v. Washington,* 466 U.S. 668, 693 (1984). The defendant must show a reasonable probability that the outcome would have been different.

Id. at 694. The Manual could only have shown that the witnesses were wrong about the usual procedures, but those procedures were not relevant to any valid defense. It is not probable that the witnesses' credibility would have been significantly damaged by their error on this collateral point, especially since the basic facts about the conditions in the building (a corroded bathtub and a non-operating exhaust fan) appear to have been uncontroverted.

Finally, Li urges that counsel was ineffective in failing to supply jury instructions to the court including a definition of what "approved means" were for ventilating stoves. His defense was that even though his stove exhaust fans were not operating, the stoves were properly ventilated because a simple open air system, without a fan at all, would have satisfied the Health Code's requirements. However, the jury must have known what the approved means were because a Health Department supervisor, Lozano, testified that an open air system is satisfactory and that he believed Li's system met that requirement. Further, defense counsel mentioned the definition of approved means in his closing argument. The jury apparently concluded that the ventilation was not adequate, possibly because they believed the non-operating fan would block the air passage so that it was not equivalent to an open air system. Therefore, Li has failed to demonstrate prejudice from the alleged errors by counsel.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

STEPHEN CHI-SEN LI,

Petitioner,

VS.

GILBERT R. RUIZ, JUDGE,
Municipal Court of East
Los Angeles, et al.,

Respondents.

CASE NO. CV88-7100-SVW (B)

JUDGMENT

Pursuant to the Order of the Court adopting the findings, conclusions, and recommendations of the United States Magistrate,

IT IS ADJUDGED that Judgment is entered dismissing the action on the merits.

DATED: December 1, 1989.

STEPHEN V. WILSON

STEPHEN V. WILSON
United States District Court

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

STEPHEN CHI-SEN LI,

Petitioner,

vs.

GILBERT R. RUIZ, JUDGE
Municipal Court of
East Los Angeles, et al.,

Respondents.

CASE NO. CV88-7100-SVW (B)

ORDER ADOPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF UNITED STATES MAGISTRATE

Pursuant to 28 U.S.C. 636(b)(1)(B), the Court has reviewed the petition, and other papers herein, along with the attached Reports and Recommendations of the United States Magistrate, and approves and adopts the latter with the following addition to page 3, line 11: "Furthermore, it should be noted that the state court found that

> [t]he appellant [Stephen Chi-Sen Li] had previously been afforded a district attorney's informal hearing, and had previously been granted an administrative hearing for repeated violations of the Los Angeles County Health Department Ordinances dealing with health standards. The record clearly reflects that the results of the informal hearing before the District Attorney and the prior Administrative hearing failed to bring the results of curing health code violation by the appellant [petitioner].

People v. Chi-Sen Li, No. CR A25024, slip op. at 2 (Cal. Super. Ct. App. Dep't Jan 26, 1988)."

Accordingly, it is hereby ORDERED that Judgment be entered (1) adopting and approving the Reports and Recommendations with the addition stated above, and (2) directing that judgment be entered dismissing the action on the merits.

It is FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate's Report and Recommendation and the Final Report and Recommendation, and the Judgment herein, by United States mail, on petitioner and counsel for respondents.

DATED: December 1, 1989

STEPHEN V. WILSON

STEPHEN V. WILSON
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

STEPHEN CHI-SEN LI,
Petitioner,
vs.
GILBERT R. RUIZ, JUDGE,
et al.,
Respondents.
CASE NO. CV89-7414-WJR (B)

JUDGMENT

Pursuant to the Order of the Court adopting the findings, conclusions, and recommendations of the United States Magistrate,

IT IS ADJUDGED that Judgment is entered dismissing the petition on the merits.

DATED: April 16, 1990.

WILLIAM J. REA
WILLIAM J. REA
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

STEPHEN CHI-SEN LI,

Petitioner,

vs.

GILBERT R. RUIZ, JUDGE,
et al.,

Respondents.

CASE NO. CV89-7414-WJR (B)

ORDER ADOPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF UNITED STATES MAGISTRATE

Pursuant to 28 U.S.C. 636(B)(1)(B), the Court has reviewed the petition, and other papers herein, along with the attached Reports and Recommendations of the United States Magistrate, and hereby approves and adopts the latter.

IT IS ORDERED that a Order be issued by the Court (1) approving and adopting this Report and Recommendation, and (2) directing that judgment be entered dismissing the petition on the merits.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate's Report and Recommendation, the Final Report and Recommendation, and the judgment herein, by United States mail, on petitioner and counsel for respondents.

DATED: April 16, 1990.

WILLIAM J. REA

WILLIAM J. REA
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

STEPHEN CHI-SEN LI,
Petitioner,
VS.
GILBERT R. RUIZ, JUDGE
Municipal Court of
East Los Angeles, et al.,
Respondents.

CASE NO. CV 88-7100-SVW (B)

FINAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

This Final Report and Recommendation and the attached Report and Recommendation are submitted to the Honorable Stephen V. Wilson, United States District Judge, pursuant to the provisions of 28 U.S.C. 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

To the Report and Recommendation served and filed October 24, 1989, petitioner has filed his timely Objections. The Magistrate has carefully read and considered these, but is unpersuaded to change his opinion. Responsive to the argument at pages 7-8 of Objections, the Magistrate strikes the concluding phrase from the sentence beginning at page 2, line 26 of the Report and Recommendation, so that it reads simply: "These are similar to violations found the year before." The deletion does not prompt a change of recommendation.

THE MAGISTRATE THEREFORE FINALLY RECOMMENDS that an Order be issued by the Court (1) adopting and approving the Report and Recommendation, and (2) directing that judgment be entered dismissing the action on the merits.

DATED: November 17, 1989.

VOLNEY V. BROWN, JR.

VOLNEY V. BROWN, JR.
United States Magistrate

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

STEPHEN CHI-SEN LI,
Petitioner,
vs.
GILBERT R. RUIZ, JUDGE
Municipal Court of East
Los Angeles, et al.,
Respondents.

CASE NO. CV88-7100-SVW (B)

SUPPLEMENTAL REPORT AND
RECOMMENDATION OF
UNITED STATES MAGISTRATE

This Supplemental Report and Recommendation is submitted to the Honorable Stephen V. Wilson, United States District Judge, pursuant to the provisions of 28 U.S.C. 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

Petitioner's counsel, paying the filing fee, initiated this action on December 1, 1988, by filing Petition for Writ of Habeas Corpus by a Person in State Custody. An earlier Report and Recommendation and Final Report and Recommendation were withdrawn by Order filed August 24, 1989, in which the Magistrate abandoned his earlier holding that petitoner had not exhausted his state remedies and established a schedule for briefing the case on the merits. Counsel having duly submitted their briefs, the matter has been at issue since October 13, 1989.

The petition shows that in June, 1986, petitioner was convicted in Municipal Court at East Los Angeles of two counts of violation of Los Angeles County ordinances

pertaining to maintenance of rented apartments, and in July, 1987 was sentenced to 180 days in jail, suspended, and three years summary probation, with a $500 penalty assessment on each count. There is an allusion to revocation of the probation, but whether petitioner is presently incarcerated is unclear.

Petitioner contends, first, that the County violated its own regulations by not giving him an administrative hearing and opportunity to comply, before initiating criminal prosecution. There is no merit to this argument. The pertinent section of the Environmental Management Policy and Operations Manual provides: "Written orders and administrative hearings shall be the initial approach to obtaining compliance with applicable laws and regulations. However, these methods must produce results. . . . Where noncompliance or repeated violations continue to occur, time extensions will not be granted and legal prosecution shall be initiated."

Petitioner was convicted of failing to keep rental tubs and showers free from dirt, filth and corrosion, and of failing to vent gas ranges by approved means. These are similar to violations found the year before, which petitioner had failed to correct. R.T. 16. In addition, as to violations found during inspections on April 25 and 26, 1985 (R.T. 18), petitioner had been notified in writing the following day to bring his property into compliance within 30 days, but inspections on June 17, 1985 and June 25, 1985 (R.T. 27-29) showed the property had not been brought into compliance. R.T. 29. It was as to the violations found on the latter date that petitioner was charged and convicted. The Magistrate finds, therefore, as a matter of fact that petitioner's said "repeated violations" excused the County from having to give him an administrative hearing pursuant to the foregoing regulation.

Petitioner asserts, second, that he was denied due process, in that he was not afforded written notice and a reasonable opportunity to comply. But as the above-summarized evidence shows, petitioner was given such written notice on about April 27, 1985, and an opportunity from that date to June 25, 1985 (nearly two months) to comply, but he did not. More specifically, petitioner complains that in Count 3 he was convicted of failing to correct a broken shower door in Apartment 14, whereas the Notice made no mention of this defect. But Count 3 charged that petitioner did not maintain bathtubs and showers in good repair and free from dirt, filth and corrosion. *Aside* from the broken shower door, the evidence shows that on June 25, 1985 the bathtub in Apartment 14 was corroded, had openings harboring cockroaches, and an apparently adjacent wall had deteriorated from water damage. R.T. 46-47. These conditions prevailed, as well, in at least two other apartments. R.T. 47, 192. Quite aside from the broken shower door, this was more than sufficient notice and violation to satisfy the 14th Amendment. Even if it were not, the requirement found elsewhere in the Notice, as to other apartments, to repair broken shower doors would have sufficed.

Petitioner alleges, third, that his due process was violated when the trial judge instructed the jury that "neither guilty knowledge nor intent of the defendant need be shown" to convict him of the crimes charged. The instruction was correct under California state law: "even where the statute requires 'wilful' violation, public welfare offenses in general are punishable without proof of criminal intent." *People v. Gonda* (1982) 138 Cal.App.3d 774, 779. Where interests such as the public health are involved, "it is the duty of the defendant to know what the facts are that are involved or result from his acts or

conduct . . ." *In re Marley* (1946) 29 Cal.2d 515, 529. Federal law is in accord as to "public welfare offenses" (*Morissette v. United States*, 342 U.S. 246, 255, (1952)), even "though consciousness of wrongdoing be totally wanting." *Id* at 260. Not that petitioner lacked any consciousness of wrongdoing. His argument that the apartments were healthful thirty days after notice, but deteriorated to the condition to which prosecution witnesses testified, is bankrupt. The Magistrate takes judicial notice of the fact that contrary to petitioner's argument, bathtubs do not corrode from acceptable to unhealthful in one month.

Fourth and last, petitioner claims that the "prosecution withheld relevant evidence that the inspectors' actions were arbitrary and capricious," in that trial counsel was informed there was no Manual, thus depriving him of the administrative hearing defense. But petitioner could not have been misled, in that he had earlier been granted administrative and District Attorney's hearings. Furthermore, petitioner was represented by retained counsel, and to the extent that the Manual contained applicable law it is presumed to have been as available to him as to the prosecutor. Law is not evidence. Finally, even if defense counsel had had the Manual in hand at the trial, it would not have availed him as to the administrative hearing defense. As the Magistrate found above, in the circumstances of this case petitioner was not entitled to further administrative process before trial.

Petitioner has not shown that he was convicted in violation of the Constitution or laws of the United States. To the contrary, it appears that he is a slumlord who spurned multiple opportunities to bring his properties into compliance with rules and regulations protecting the health and safety of the citizens of this county, and who

even after conviction may have violated his probation by continuing his adamant noncompliance. He is not entitled to the writ he seeks.

THE MAGISTRATE THEREFORE RECOMMENDS that an Order be issued by the Court (1) approving and adopting this Supplemental Report and Recommendation, and (2) directing that judgment be entered dismissing the action on the merits.

DATED: October 23, 1989.

VOLNEY V. BROWN, JR.

VOLNEY V. BROWN, JR.
United States Magistrate

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

STEPHEN CHI-SEN LI,
Plaintiff,

VS.

GILBERT R. RUIZ, JUDGE, et al.,
Defendants.

CASE NO. CV89-7414-WJR (B)

FINAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

This Final Report and Recommendation and the attached Report and Recommendation are submitted to the Honorable William J. Rea, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

To the Report and Recommendation served and filed March 16, 1990, plaintiff has filed his timely Objections. The Magistrate has carefully read and considered these, but is unpersuaded to change his opinion. No findings have been made "with respect to Gonzalez' and Lozano's false testimony at trial" because this was not at issue herein, except very collaterally respecting trial counsel's competence. It is true that trial counsel could have spent more time and money preparing and presenting a defense, but there is no evidence that petitioner directly authorized him to do so. The defense, which would have been inadequate in a capital case, is found quite appropriate in this instance involving only fines and probation.

THE MAGISTRATE THEREFORE FINALLY RECOMMENDS that an Order be issued by the Court (1) adopting and approving the Report and Recommendation, and (2) directing that Judgment be entered dismissing the petition on the merits.

DATED: April 12, 1990.

VOLNEY V. BROWN, JR.

VOLNEY V. BROWN, JR.
United States Magistrate

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

STEPHEN CHI-SEN LI,
Petitioner,
vs.
GILBERT R. RUIZ, Judge,
et al.,
Respondents.
CASE NO. CV89-7414-WJR (B)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

This Report and Recommendation is submitted to the Honorable William J. Rea, United States District Judge, pursuant to the provisions of 28 U.S.C. 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

Through counsel and paying the $5.00 filing fee, petitioner originated this action on December 26, 1989, by filing Petition for Writ of Habeas Corpus by a Person in State Custody. A Return and a Traverse having each been timely filed, the matter has been at issue since March 13, 1990.

Petitioner is a landlord whose obdurate refusal to maintain his apartments in a sanitary condition caused him to be cited and, ultimately, convicted of violating ordinances of the County of Los Angeles pertaining to public health. Following exhaustion of his state remedies, he tested the constitutionality of this conviction in this court in *Chi-Sen Li* v. *Ruiz,* CV88-7100-SVW(B), a copy of the Supplemental Report and Recommendation dated October 23, 1989 in which is attached hereto and made a part hereof by reference. Such Report concluded, as did Judge Wilson in his Order and Judgment dismissing the

action on the merits, that petitioner was not convicted in violation of the Constitution or laws of the United States.

In the above-cited lower-numbered action, petitioner was unable to present a then-unexhausted issue which is the sole question here: whether in the state proceedings he had inadequate assistance of counsel. Respondent argues in the Return that because petitioner's counsel was retained, he is precluded from questioning his effectiveness. This argument fails, of course, because "drawing a distinction between retained and appointed counsel . . . would deny equal justice to defendants who must choose their own lawyers." *Cuyler* v. *Sullivan*, 446 U.S. 335, 344-45 (1980). The Magistrate rejects, as well, respondent's argument that petitioner waived the ineffectiveness of counsel issue by not presenting it in the earlier petition. But the issue was not then exhausted in state court, and petitioner was not required to delay presentation of his other issues pending such exhaustion. We must, therefore, and we now do, reach the merits of the question presented.

Petitioner asserts that his counsel was inadequate in that he failed to raise and prevail upon the several issues unsuccessfully presented in the lower-numbered habeas action. But Judge Wilson's determination that these issues are meritless answers this contention. It is not incompetence for counsel to fail to raise meritless questions.

Petitioner alleges that his counsel was ineffective in that he failed to make certain investigations. This claim must be considered in light of the strength of the case against petitioner. When, as here, the prosecution has an overwhelming case based on documents and the testimony of disinterested witnesses, there is not too much the best defense attorney can do. *Eggleston v. United States*,

798 F.2d 374 (9th Cir. 1986). Petitioner is a slumlord who shunned several opportunities to bring his residential rental units into compliance with basic health laws. His appropriate defense was compliance and apology, not "investigation."

To establish his claim of ineffective assistance of counsel petitioner must show that his attorney's performance fell below the standard of reasonably effective assistance and that there is a reasonable probability that, but for counsel's errors, the result would have been different. *Stickland v. Washington,* 466 U.S. 668, 687 (1984) Here, petitioner has failed to meet either of these requirements.

THE MAGISTRATE THEREFORE RECOMMENDS that an Order be issued by the Court (1) approving and adopting this Report and Recommendation, and (2) directing that judgment be entered dismissing the petition on the merits.

Dated: March 15, 1990

VOLNEY V. BROWN, JR.

VOLNEY V. BROWN, JR.
United States Magistrate

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

STEPHEN CHI-SEN LI,
Petitioner,
VS.
GILBERT R. RUIZ, JUDGE,
Municipal Court of
East Los Angeles, et al.,
Respondents.
CASE NO. CV88-7100-SVW (B)

FINAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

This Final Report and Recommendation and the attached Report and Recommendation are submitted to the Honorable Stephen V. Wilson, United States District Judge, pursuant to the provisions of 28 U.S.C. 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

To the Report and Recommendation served and filed October 24, 1989, petitioner has filed his timely Objections. The Magistrate has carefully read and considered these, but is unpersuaded to change his opinion. Responsive to the argument at pages 7-8 of Objections, the Magistrate strikes the concluding phrase from the sentence beginning at page 2, line 26 of the Report and Recommendation, so that it reads simply: "These are similar to violations found the year before." The deletion does not prompt a change of recommendation.

THE MAGISTRATE THEREFORE FINALLY RECOMMENDS that an Order be issued by the Court (1) adopting and approving the Report and Recommendation, and (2) directing that judgment be entered dismissing the action on the merits.

DATED: November 17, 1989.

VOLNEY V. BROWN, JR.

VOLNEY V. BROWN, JR.
United States Magistrate

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHEN CHI-SEN LI,
Petitioner - Appellant,
VS.
GILBERT R. RUIZ,
Judge, Municipal Court of East Los Angeles;
COUNTY OF LOS ANGELES;
ATTORNEY GENERAL OF THE
STATE OF CALIFORNIA,
Respondents - Appellees.

STEPHEN CHI-SEN LI,
Petitioner - Appellant,
VS.
COUNTY OF LOS ANGELES
Respondent - Appellee.

No. 90-55432
D.C. No. CV-88-7100-SVW

ORDER

No. 90-55695
D.C. No. CV-89-7414-WJR

Before: NORRIS, HALL and RYMER, Circuit Judges

Appellant's petition for rehearing is denied.

Filed March 5, 1991

APPENDIX G

AMENDMENT V TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land of navel forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX H

AMENDMENT VI TO THE UNITED STATES CONSTITUION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX I

AMENDMENT XIV SECTION 1 TO THE UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX J

LOS ANGELES COUNTY HEALTH CODE REGULATIONS

11.02.080 *Violation — Penalty.* Violation of Division 1 of Title 11 is punishable by a fine of not more than $500.00, or by imprisonment in the County Jail for not more than six month, or by both such fine and imprisonment. Each day during any portion of which any violation of any provision of this Division 1 is committed, continued or permitted makes such violation of a separate offense. (Ord. 7583 Part 1 110, 1959.)

11.02.140 *Shall and may.* The word "shall" is mandatory; the word "may" permissive. (Ord. 7583 Part 1 106, 1959).

11.02.150 *Purpose of provisions — Statutory definitions incorporated when.* Part 2 of Chapter 11.02 and Chapters 11.06 through 11.38 of this title are intended to supplement the provisions of the laws and regulations of the state of California by prescribing higher standards of sanitation, health and safety. Whenever any technical words or phrases are not defined herein, but are defined in such laws and regulations of the state, such definitions are incorporated in this part and shall be deemed to apply as though set forth herein in full.

11.02.160 *Rules and regulations — Promulgation and enforcement authority.* The director may take and enforce such rules and regulations as may be necessary or proper to enforce Part 2 of this Chapter and Chapters 11.06 through 11.38 of this code. (Ord. 8588 2 (part), 1964; Ord. 7583 Part 3 Ch. 1 321, 1959).

11.02.190 *Nuisance abatement — County to perform work when — Costs.* Whenever a nuisance or condition endangering the public health shall be ascertained to exist on

any premises, or in any house, or any other place, the director shall notify in writing the person having control of or acting as agent for such premises, house or other place, to abate or remove such nuisance or condition within a reasonable time, to be stated on such notice. Upon the neglect or refusal of such person to comply with such notice, the director may abate such nuisance or condition, and the person having control of such house, premises or place, in addition to the penalties provided by this Division 1, shall be liable to the county of Los Angeles for the cost of such abatement, to be recovered in a civil action in any court of competent jurisdiction. (Ord. 81-0037 1, 1981: Ord. 7583 Part 3 Ch. 1 317, 1959).

11.02.300 *Nuisance.* "Nuisance" means and includes any of the following:

A. Any public nuisance known to common law or equity jurisprudence, and whatever is dangerous to human life or detrimental to health;

B. Overcrowding a room with occupants;

C. Inadequate or insanitary sewerage or plumbing facilities;

D. Insufficient ventilation or illumination;

E. Uncleanliness, or anything that renders air, food and drink detrimental to the health of human beings.

11.20.140 *Substandard dwelling.* A. "Substandard dwelling" means any dwelling, house court, dormitory, hotel, motel or apartment house which, through lack of maintenance or repair, generally endangers the life, limb, health, property, safety or welfare of the public, or of the occupants thereof.

B. Conditions which render a structure a "substandard dwelling" include, but are not limited to, any of the following:

1. Lack of approved toilet or privy structure, bathtub or shower, kitchen sing, hot and cold running water, or other required approved plumbing within an apartment or dwelling;

2. Lack of exterior wall or roof covering adequate to protect the occupants from the elements;

3. Damaged interior walls, partitions, floors or ceiling;

4. Plumbing fixtures and piping which have become insanitary or are otherwise in a condition to create a health hazard;

5. Sewage disposal system which has become insanitary or is otherwise in a condition to created a health hazard;

6. Unreasonable collection of rubbish, debris or trash upon the premises;

7. Any of the conditions specified in Section 11.02.300, subsections B, C, D or E;

8. Use of other than habitable rooms for living, cooking or eating purposes;

9. Incomplete construction;

10. Infestation by insects, vermin or rodents;

11. General dilapidation;

12. Lack of water supply adequate to sustain the health of the inhabitants. (Ord. 8588 1 (part), 1964: Ord. 7583 Part 3 Ch. 11 809, 1959.)

11.20.190 *Toilet rooms and bathing facilities.* Every dwelling unit shall contain a lavatory and bathtub or shower. All lavatories, bathtubs and showers of dwellings, house courts, hotels, motels and apartment houses shall be provided with hot and cold running water under pressure. All toilet rooms, bath and shower rooms and utility rooms shall be adequately lighted and ventilated to the outside atmosphere. All such rooms and the fixtures and equipment therein shall be maintained in a state of good repair and free from dirt, filth and corrosion. It is unlawful for any person to occupy or to cause or permit another person to occupy any dwelling-unit which does not comply with this section. (Ord. 12098 1, 1980: Ord. 8588 1 (part), 1964: Ord. 7583 Part 3 Ch. 11 819, 1959.)

11.20.240 *Gas ranges — Venting.* A. A gas range shall be vented by one of the following means:

1. A ventilator opening in the wall or ceiling having an area of not less than six by eight inches and connecting with a ventilating duct of not less than 36 square inches in cross-sectional area leading to the outside air;

2. An approved system of forced-air ventilation.

B. Gas ranges in buildings erected after September 25, 1959, shall be ventilated by a vent located approximately over the top of surface cooking facilities. (Ord. 7583 Part 3 Ch. 11 824, 1959.)

11.20.340 *Dwellings — Maintenance required — Abatement of nuisance.* All dwellings, house courts, dormitories, hotels, motels or apartment houses, as defined in this Division 1, shall be maintained, repaired and reconstructed in accordance with the provisions of applicable codes. Any dwelling, house court, dormitory, hotel, motel or apartment house which has become unfit for human

habitation, use or occupancy, or which has become a substandard dwelling as defined herein, is declared to be a nuisance and shall be abated through correction, repair, reconstruction or demolition in accordance with applicable codes. (Ord. 8588 1 (part), 1964: Ord. 7583 Part 3 Ch. 11 808, 1959.)

APPENDIX K

COUNTY OF LOS ANGELES — DEPARTMENT OF HEALTH

Environmental Management

Policy and Operations Manual

Subject: General Enforcement Policy, No. 105.01, provides:

PROGRAM APPLICATION

ALL PROGRAMS

PURPOSE

Environmental Management's primary responsibility is the enforcement of state and local laws and regulations as they apply to our various program areas. As individuals representing the Department it is our duty to obtain compliance with these laws and regulations. The following statement of policy and procedure is intended to set forth guidelines to accomplish this end.

POLICY

Written orders and administrative hearings shall be the initial approach to obtaining compliance with applicable laws and regulations. However, these methods must produce results. Other corrective actions may include quarantine, condemnation, closure and health permit suspension, revocation or denial, where appropriate.

Where non-compliance or repeat violations continue to occur, time extensions will not be granted and legal prosecution shall be initiated.

This policy does not preclude joint planning with owners/operators for improvement programs, resulting in systematic, measurable upgrading of the establishment or operation. However, such improvement plan must specify in writing, objectives and reasonable times for completion. Time extensions shall not be granted where substantial and continuing progress is not evident.

Any deviation from this policy must be approved by the responsible Manager or Division Chief.

PROCEDURE

Inspection/Investigation

Prior to beginning any routine inspection or complaint investigation, sanitarians shall observe the following procedure:

1. Present proper identification to a responsible party on the premises.

2. State the purpose of the visit.

3. Request permission to conduct the inspection or investigation.

4. If permission is denied before or during the visit, sanitarians shall leave the premises and report the matter to their supervisors.

General Enforcement

Where no significant progress has been made within the time frame specified on an Official Inspection Report or written notice, an administrative hearing shall be scheduled to allow the owner/operator the opportunity to show cause why legal prosecution should not be initiated.

If the owner/operator is not cooperative or fails to meet the conditions set forth at the administrative hearing, the case shall be referred to the appropriate District/City Attorney's office for action.

Repeat and Recalcitrant Violations

Where a repeat or recalcitrant violator has been cited for similar significant violations on previous routine or complaint investigations, additional time extensions may be granted *only* if these recurring violations have not occurred on more than three previous routine or complaint investigations within the past twelve (12) months. It is therefore imperative that violations be documented on all inspections where they are identified. Where similar significant violations have occurred on three previous routine or complaint investigations a Report of Investigation and other case materials shall be prepared and submitted to the City/District Attorney's office for prosecution.

This policy does not preclude the referral of a case to the City/District Attorney at any time prior to the third routine or complaint investigation.

Imminent Danger

Environmental conditions posing an imminent threat to the health adn safety of individuals or neighborhoods (such as overflowing sewage, heavy rodent infestation, pesticide contamination of food and water, etc.) must be considered on an emergency basis. All direct and expedient actions, including referral to the City/District Attorney and any other procedures deemed necessary must be initiated immediately to alleviate the situation.

Health Permit Enforcement

With reference to retail food facilities, the suspension, revocation or denial of health permits may be utilized as an enforcement tool where circumstances warrant (see policy 205.06).

REFERENCE

"General Enforcement Policy" 7/21/81. Dist. No. 81.8d Policy 205.06, Permit Procedure-Retail Food Facilities

COUNTY OF LOS ANGELES —
DEPARTMENT OF HEALTH

Environmental Management

Policy and Operations Manual

Subject: Official Notice of Violation and Hearing Notice, No. 105.05, provides:

PROGRAM APPLICATION

ALL PROGRAMS

POLICY

The Official Notice of Violation (H-777) is issued in cases where violations are observed in non-licensed establishments and on non-licensed property.

The Hearing Notice (H-778) is issued in cases where the OIR, Official Notice of Violation and letters of violation do not result in satisfactory compliance.

PROCEDURE

The Official Notice of Violation is used to issue written orders for correction of violations only in the event that an appropriate official inspaction report cannot be issued. The Official Notice of Violation can be issued to: a tenant in a single or multiple dwelling unit, eg. pack rat; an employee who was found smoking in a food preparation area; individuals found dumping trash, or garbage on public or private property; owners or operators of food establishments to provide proper plans to the Plan Check Section, business establishments where sanitation viola-

tions occur; individual tenants of mobile home parks, and others.

The correct use of the form is as follows:

Subject: Enter the environmental unit such as single family dwelling unit, vacant lot, etc.

Address: Address of environmental unit.

To: Owner, operator, tenant, or responsible person.

Address: Address of owner, operator, tenant or responsible person to include City, State and Zip code.

You are hereby directed to: Brief statement of specific method to correct violations.

This notice shall be complied with as requested: Check appropriate box or boxes.

Correction date: Enter date violation is to be corrected or when revisit is to be made.

Received by: Whenever possible obtain the signature of the responsible person. If unavailable send it to the responsible person by US mail. In some cases it may be necessary or advantageous to post the notice. In either case indicate how the notice was delivered.

By: Sanitarian's signature.

The Hearing Notice is used to request an administrative office hearing in cases where a violator has not satisfactory corrected previous orders of compliance. The Hearing Notice can be issued in all cases as the first step in due process of law.

The correct use of this form is as follows:

To: Owner, operator, tenant or responsible person.

Address: Address of above.

Subject: Enter the environmental unit such as Restaurant, Bakery, Multiple dwelling unit, etc.

Address: Address of above.

Upon inspection of the above property we found that you had not complied with: enter reference to OIR, Official Notice of Violation or other orders issued to owner or operator. Reference may also be made to specific State, County or local codes and/or ordinances.

Therefore, you are hereby requested to appear at a hearing on this matter. It will be held at _____ *(a.m.)(p.m.)* : enter time and date.

Place: Enter address where hearing will take place.

Received by: Signature of responsible person. If unavailable, enter "US Mail" and check box "First Class".

By: Signature of Chief Sanitarian or person authorized to schedule hearings.

Distribution:

White copy — will be issued or mailed to violator, responsible person, owner, operator, etc.

Yellow copy — will be retained by the sanitarian and attached to complaint, field card or other correspondence relating to the inspection.

Pink copy — to the Chief Sanitarian.

Blue copy — (Hearing notice only) to the Chief Sanitarian or appropriate hearing officer.

COUNTY OF LOS ANGELES —
DEPARTMENT OF HEALTH

Environmental Management

Policy and Operations Manual

Subject: Office Hearings, No. 105.09, provides:

PROGRAM APPLICATION

ALL PROGRAMS

INTRODUCTION

The Office Hearing is usually the first and most often the last step in the case of a sanitation violation. The violator is ordered to be present at the Hearing to state his case and be told how he should modify his operation to function in accordance with the law.

PROCEDURE

The Office Hearing may be considered as the third step in the legal process preceding the court appearance by the defendant and Sanitarian. The issuing of the Official Notice or Inspection Report may be considered as the first step, while the revisit, or telephone call, the second step.

It is brought to the attention of the violator at the Hearing that unless the violation is abated the case will be filed with the City or District Attorney's Office. The consequences that may result when one goes to court will be explained to the violator. The violator is given an opportunity to suggest a date (within a reasonable amount of time unless an emergency exists) in which he

will comply with the notice. At the conclusion of the hearing, the results, along with the violators name, address, phone, drivers license number and birth date shall be recorded as part of the record. This information will be needed in the event a referral is made to the City/District Attorney.

The Sanitarian will return to the location of the violation on the date set for a re-inspection. If the Office Hearing fails to produce optimum results, the case will be referred to the City or District Attorney's office where a similar hearing may be arranged. The City or District Attorney Hearing may be omitted and the case filed with the appropriate attorney for court.

In the City of Los Angeles, the court case may be filed and administered through the Court Liaison. The Court Liaison will follow through with the City/District Attorney Hearing and arraignment (refer to Court Liaison Program Policy No. 105.21).

All other cases may be filed by the Sanitarian with the appropriate City or District Attorney's office in their respective city.

COUNTY OF LOS ANGELES —
DEPARTMENT OF HEALTH

Environmental Management

Policy and Operations Manual

Subject: Court Liaison Program, No. 105.21, provides:

PROGRAM APPLICATION
DISTRICT ENVIRONMENTAL SERVICES

PURPOSE

This procedure was developed to maximize District Environmental Services' effectiveness and to reduce the number of man hours expended in court case adjudication within the Los Angeles City Judicial System.

All interaction with the Los Angeles City Attorney's office involving filing of criminal complaints, arraignments, and violations of probation proceedings will be handled by the Court Liaison Representative. Actual court trials and routine City Attorney hearings will continue to be handled by the Staff Sanitarian.

Specified days of court appearance will be scheduled and adhered to by the Court Liaison Representative, *in so far as possible.*

PROCEDURE

Filing a Complaint

A. After the decision to file a complaint is made, the *Sanitarian* shall:

1. Draft the Report of Investigation as indicated in Attachment *A*.

2. The draft must include the following information in the upper left corner:

a. Name of respective Environmental Service Area.

b. Type of establishment being filed upon (i.e., single-family dwelling, restaurant, etc.)

c. The words "court case" or "District Attorney/City Attorney Hearing" followed by a line _____ for the Chief Sanitarian's initials.

3. The following are important points to remember when preparing the Report of Investigation:

a. The defendant's name must be accurate and complete. (First name, middle name or at least middle initial, and last name.)

b. The defendant must be identified as owner, corporate officer, tenant, operator, license, corporation, Ltd partnerships, etc.

c. Provide the suspect's description on the Report of Investigation and include his/her full name, sex, descent, hair, eyes, height, weight, date of birth, drivers license number and state of issue.

d. If possible, apply State Law first and County Public Health Code second.

e. Copies of necessary documents must be certified.

f. List prior court actions.

4. Submit a legal owner request form (H-157 — rev. 5-72) with the indicated information including the legal description of the property (Attachment B). Request a certified copy of the grant deed and

certified copies of the Public Health License and corporate documents where necessary.

5. Date and sign three (3) misdemeanor complaint forms (Attachment E).

6. Complete and sign a Declaration In Support of Arrest Warrant made under Section 2015.5 Civil Code of Procedure (Attachment C).

7. Identify any exhibits (evidence) and maintain them sealed so as to avoid questions regarding chain of custody. On a legal packet form, the Sanitarian shall list all exhibits collected.

8. When photographs are taken, a list describing each photograph shall be retained in the staff location. All photographs, except polaroid, should be numbered according to the frame or exposure number.

B. The Senior Sanitarian shall review the Report of Investigation draft with the necessary documents and submit it to the Chief Sanitarian for final review and approval.

C. The Chief Sanitarian is responsible for the accuracy and completeness of the Report of Investigation and documentation. He shall:

1. Call the Bureau Director's office to determine if there were any prior court actions taken by the county, against the defendant.

a. If there is a previous record, it should be so noted on the Report of Investigation under "Defendant's Previous Record".

b. If the defendant has no previous record, enter "none".

2. Review the Report of Investigation after it is typed and signify approval by initialing the line in the upper left corner.

3. Complete the Legal Packet Check List in order to assure that all necessary documents are included in the court case folder. Include specific conditions of probation desired, in the event the case is adjudicated during arraignment process. Also include those days the Sanitarian will *not* be available to appear in court in the event the case is set for trial. (Attachment D)

4. Deliver the court case folder containing the original Report of Investigation, plus three (3) copies, the Declaration in Support of Arrest Warrant, Suspect Description Form, photographs, certified grant deed, corporate documents, certified Public Health License, legal packet check list, probation recommendations, and other necessary documents to the Court Liaison Representative.

D. Upon receipt of the court case folder, the *Court Liaison Representative* shall:

1. Review the court case folder to be sure it is complete and obtain additional documents if necessary.

2. File Reports of Investigation routinely one day per week. The procedure can be expedited in case of an emergency.

3. Submit the original and two copies of the Report of Investigation to the City Attorney/District Attorney and retain one copy for his files.

4. Review the City Attorney's formalized complaint, for accuracy by comparing it with the Report of Investigation.

5. He shall then initiate the necessary court case file and schedule the arraignment date with the City Attorney's office.

6. When the complaint is formally filed the court sets the time and date of arraignment. The City Attorney's office then mails the letter of notification for arraignment to the defendant.

7. The Court Liaison Representative must have a report from the District Sanitarian of the conditions as they exist on the *day before* the arraignment so that an up-to-date report can be given in the arraignment court.

8. Appearance in Division 81 (Los Angeles City) for the arraignment of the defendant is scheduled by the Court Liaison Representative approximately three weeks after filing of the case. Appearances are always on a Thursday.

a. The defendant enters a plea at the arraignment court.

b. The "M" number will be obtained from the Court Clerk at this time.

Court Deliberations at the Arraignment

A. If there is a *Guilty Plea*:

1. The case is resolved without further litigation. A Prosecution Report (Attachment F) is subsequently completed by the Court Liaison Representative.

   a. Four (4) copies are prepared for distribution:

   — Two copies to the Regional Manager (three, if food related)

   — One copy to the District Chief

   — One copy for Court Liaison files

2. The "M" number will always be included on the Prosecution Report.

3. Dba name must be included in food-related cases.

B. Continuances will also be monitored by the Court Liaison Sanitarian.

C. If there is a *Not Guilty Plea*:

1. A trial date will be set.

2. All documents regarding the case will be returned to the Chief Sanitarian, or his designate, by the Court Liaison Representative.

   a. A telephone call is to be made by the Court Liaison Representative to the Chief Sanitarian to affirm delivery of said documents.

   b. A check list is to be made by the Court Liaison Representative recording the types of documents sent.

   c. A copy of this list is to be retained by the Court Liaison Representative.

3. The complaining witnesses then prepare themselves for trial.

a. Check to see if all necessary documents to show responsibility of person(s) filed against have been obtained.

REFERENCE

District Environmental Services Director "Court Liaison Program" 12/1/76 — Distribution No. 76-56c

COUNTY OF LOS ANGELES —
DEPARTMENT OF HEALTH

Environmental Management

Policy and Operations Manual

Subject: All Programs, No. 105.22, provides:

PROGRAM APPLICATION

ALL PROGRAMS

The purpose of the Notice to Appear citation is to complement and not necessarily replace existing Bureau enforcement procedures. The process of issuing Official Notices or Official Inspection Reports and the holding of administrative hearings by area and program chiefs will continue. Citations should be issued after those regular enforcement procedures have failed to accomplish the required corrections. Occasionally, because of severe public health consequences, it may be necessary to issue a Notice to Appear before all regular enforcement procedures have been exercised; however in all cases supervisory review and City Attorney or District Attorney approval is mandatory.

The Notice to Appear is to be used throughout the jurisdiction of the County Health Officer in the enforcement of those codes or ordinances for which he is responsible. Authority to issue citations is based upon Sections 836.5 and 853.6 of the California Penal Code, which prove that an arrest may be made of a person without a warrant whenever a misdemeanor is committed in the presence of the officer. The issuing of a Notice to Appear is but a means to release an offender from his arrest upon his signed promise to appear in court. It is not our policy to

take into physical custody, transport and book violators. Should the offender refuse to sign the citation, a formal complaint should be sought instead from the City or District Attorney's office. At this time, a request may be made for an arrest warrant to be issued.

To aid and inform the court in the disposition of cases a Report of Investigation (H-136) should accompany the court copy of the citation. Limited space available on the citation does not permit a detailed description or history of the case to be entered.

It is essential that district courts be informed of the new Health Department citation procedure. Especially important is the prompt delivery of the court copy of the citation and the prior determination of those days most preferred by the court for appearance of health law cited violators. An information liaison with court clerks should also be established so that the department is aware of case disposition as they occur. Chief Sanitarians are responsible for establishing the coordination in their districts/programs between the courts and the department.

It is preferable though not essential that the Notice to Appear be issued in the company of a sanitarian witness. Strive to complete all information on the form. Where information is unknown, unavailable, or the offender refuses to divulge it, enter such on the citation.

Antagonistic confrontations are to be avoided if at all possible. If hostility is encountered, the Sheriff or the local Police Department may be summoned to preserve the peace. They will not, however, make an arrest on the basis of a health law violation. Where uncertainty exists regarding procedures, supervisory help should be sought

from the Chief or Environmental Health Services Manager and the District or City Attorney's office.

As in current Bureau procedures, the Environmental Health Services Manager is to be notified of all court prosecutions. Include a Xerox copy of the citation with the prosecution report.

Without exception, Notice to Appear citations are to be individually and carefully accounted for. Each citation is numbered for sequential issuance. Chief Sanitarians are responsible for maintaining supervisory control over these notice pads.

All information on the Notice to Appear is to be legibly printed in the following manner:

Date: The month, date and year on which the citation is issued.

Time: The time of day at which the citation is being issued.

Name: The full name of the person who is to be charged with violation of health laws.

Residence Address: The home address and city of the violator.

Business Address: The address and city of the violator's place of business.

Driver's License Number: The operator's license number and the State from which it is issued. If not available or none, enter this information.

Vehicle License Number: The auto, if any, which is involved in the violation. (as examples, a hawker's vehicle or a cess pool pumper)

Sex: Circle the gender of the violator.

Hair: The color of the violator's hair.

Height: The height in feet and inches of the violator. Approximate if necessary.

Weight: The weight of the violator. Approximate if necessary.

Birthdate: The month, day and year of the violator's birth.

Violation(s): Identify the code and the specific section(s) of the law which are believed to be violated and on which the citation is based.

Description: Describe in concise terms the nature of the violation. More complete and detailed information and background concerning the violation should be provided on a separate Report of Investigation (H-136).

Evidence Seized: Identify any evidence by number and kind that has been taken at the time of violation. If none, leave blank.

Booking Required: Leave blank.

Location violations committed: The address or other specific location, including city, at which the violations occurred.

Violations not committed in my presence, certified on information and belief: Leave blank. (This item is checked generally by a jailer who may release a misdemeanor violator from custody on his signed promise to appear in court.)

Issuing Officer: The signature of the sanitarian who issues the citation.

District Office: The name of the office at which the issuing sanitarian is headquartered.

Name of arresting officer if different from above: Leave blank (This space is primarily for jail use when releasing misdemeanor prisoners)

Signature: Signing of the citation by the violator is absolutely essential for the form to be processed by the court. Failure to sign as a promise to appear in court will require a complaint to be filed with the District Attorney or City Attorney and a request for an arrest warrant to be issued.

Municipal-Justice-Juvenile Court: Check the appropriate type of court to which the violator is being cited.

Address-City: The street address and city of the court at which the violator is to appear.

On the day of , 19 , at M.: Complete the date, month, year and time at which the violator is to appear at court. Allow at least five days and generally no more than eleven days for the violator to appear. OR

Within 11 days: A non-specific date and time can only be used if a bail schedule has been established.

Office of Court Clerk: Enter the business hours of the court clerk.

Disposition of Copies: White copy original to violator Yellow copy duplicate to court Pink copy triplicate to file.